Supreme Court, U.S.
FILED
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No. 04-

IN THE

Supreme Court of the United States

ANIEFIOK AKAN-ETUK,

Petitioner,

v.

COUNTY OF SANTA CLARA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, SIXTH APPELLATE DISTRICT, STATE OF CALIFORNIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

As a means of protecting an appellant's Fifth and Fourteenth Amendment rights to due process and equal protection, is an appellant entitled to additional time to prepare an opening brief in a State Appellate Court while awaiting a ruling on a motion to augment and correct the record on appeal (the additional time being provided with the ruling, starting at the time of the ruling, and being equal to that which is normally prescribed for a final notice to submit an opening brief)?

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Petitioner, Aniefiok Akan-Etuk, respectfully requests that a writ of certiorari be issued to review the judgment of the Supreme Court of California in this case.

CITATIONS OF REPORTS OF OPINIONS AND ORDERS ENTERED IN THE CASE

The opinions and orders entered in the case have not been reported and are set forth in Appendices A-C.

BASIS FOR JURISDICTION

On May 12, 2004, the California Supreme Court denied a timely filed petition for review of the California Court of Appeal's dismissal of the Petitioner's appeal (App. D).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Relevant portion of 5th Amendment to the United States Constitution:

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

Relevant portion of Section 1 of 14th Amendment to the United States Constitution:

"nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The fundamental question in this case is whether an appellant is entitled to additional time to prepare an opening brief in a State Appellate Court while awaiting a ruling on a motion to augment the record on appeal (the additional time being provided with the ruling, starting at the time of the ruling, and being equal to the 15 days that is prescribed for a final notice to submit an opening brief)? The question arises in the context of the Petitioner's March 10, 2004 motion to a California Appellate Court to set aside its dismissal of the Petitioner's Appeal and in the context of the Petitioner's April 5, 2004 petition to the California Supreme Court for review of the dismissal of appeal.

The Petitioner was still working on obtaining documents to further augment the record. On February 18, 2004, the California Court of Appeal, Sixth Appellate District filed a decision providing the Petitioner, who was acting in pro se, a 5-day final notice to file his appellant's opening brief. The decision read,

> Appellant's [previous] motion to augment the record on appeal is granted. Appellant's request for extension of time to file his opening brief [which was part of the motion to augment record] is denied and the brief is due within 5 days of this order. No further extensions of time to file the opening brief shall be granted by the court in this case.

On February 25, 2004, the California Court of Appeal filed a decision dismissing the Petitioner's appeal, citing the Petitioner's failure to file an appellant's opening brief after a notice given under Rule 17(a), California Rules of Court.

The Petitioner timely filed a motion to set aside dismissal on March 10, 2004 at the same State Appellate Court. In the motion to set aside dismissal, the Petitioner explained that he had believed, "based upon the previous augmentation of record notice, that the time allocated for the filing of a motion would be at least 15 days after the completion of the augmentation of record." The Petitioner also explained that he

> "was consumed with sourcing funds and generating income to maintain compliance with the lower court ruling that is being appealed in this case. Compliance with the lower court judgment is necessary to avert the imminent sanctions . . . The lower court ruling . . . has brought the Appellant to the brink of financial collapse." Finally, explained the Petitioner, he "was experiencing extreme financial duress and a number of obligations were crossing into a state of default, so the Appellant was spending all of his time attempting to source funds, generate income, and negotiating [sic] relief."

The California Court of Appeal denied the motion to set aside dismissal on March 25, 2004 without elaborating on its decision.

On April 5, 2004, the Petitioner submitted a timely petition for review of the dismissal of appeal to the California Supreme Court. The Petitioner maintained that

> the dismissal of appeal is *not* in conformance with Rule 17(a) of the California Rules of Court, which states that if a party fails to file an appellant's

> opening brief, the party must be notified by mail that the brief must be filed within 15 days after the notice is mailed. The notice issued by the Court of Appeals, Sixth Appellate District upon its acceptance of the Petitioner's augmentation of record with an omitted trial exhibit failed to provide the 15 day period required of such final notices.

The Petitioner reiterated to the California Supreme Court that

> while there is a need to keep appeal cases moving, this need is outweighed by the need for the Petitioner to maintain compliance with the *unfavorable* trial court judgment (which has *not* been stayed). The Petitioner had to address in a timely manner the significant ongoing legal/ financial obligations and issues arising from the judgment before February 27, 2004. Failure to do so would have resulted in crippling sanctions and total financial collapse.

The Petitioner added, "Further reason that the appeal should not have been dismissed is that this appeal provides the quickest way to examine Santa Clara County's practice of disregarding an earlier California Supreme Court decision against the County." Finally, the Petitioner asserted that

> the complexity of the appeal made it difficult for the Petitioner to meet the final notice for submitting an appellant's opening brief. The Clerk's Transcript on Appeal shows that the Petitioner wished to address at least 9 points in

> his appeal. In addition, the exact scope and direction of the argument in the opening brief was awaiting the determination of exactly which documents could be secured and incorporated within the record by augmentation. Such complexity required more time than usual for the preparation of an appeal by the unrepresented Petitioner.

On May 12, 2004, without elaborating, the California Supreme Court denied the petition for review of the California Court of Appeal's dismissal of appeal.

REASONS FOR GRANTING THE PETITION

Granting extra time for the Petitioner to prepare his appellant's opening brief would preserve his Fifth and Fourteenth Amendment rights to due process and equal protection, without trampling upon the rights of Santa Clara County, the Respondent. The Petitioner is compliant with the trial court judgment, as the judgment has NOT been stayed. On the other hand, the State Court's denial of a 15 day final period to prepare the opening brief has resulted in the upholding of a judgment that is financially and otherwise devastating to the Petitioner. This is of particular concern because the Petitioner in filing his appeal had noted a significant number of serious irregularities in the trial court, some of which were potentially criminal in nature. At worst, the Petitioner believes the State Appellate Court should have attempted to decide the case based solely on the statement of issues on appeal. *See, e.g., Garcia-Cortez v. Ashcroft*, No. 02-70866 (9th Cir. April, 2004).

By California Court Rule 14(a)(2)(C), an appellant's opening brief cannot contain reference to a material that has not been incorporated within the record: "An appellant's opening brief must provide a summary of the significant facts limited to matters in the record." Once a motion to augment

the record is filed, it is a reasonable expectation that a standard amount of additional time will be provided when a ruling is made on the motion, because a brief cannot be completed until the appellant knows whether his augmentation notice is granted or denied (and whether the appeal is completely closed to further augmentation of record). Upon ruling on the appellant's motion to augment, the State Appellate Court could proceed to issue a typical final notice to submit an opening brief with a 15-day grace period.

California Court Rule 17(a) reads,

> If party fails to timely file an appellant's opening brief or a respondent's brief, the reviewing court clerk must promptly notify the party by mail that the brief must be filed within 15 days after the notice is mailed and that failure to comply will result in one of the following sanctions: (1) if the brief is an appellant's opening brief, the court will dismiss the appeal.

It is true that California Court Rule 17(d) states that

> within the period specified in the notice under (a), a party may apply to the presiding justice for an extension of that period for good cause. If the extension is granted and the brief is not filed within the extended period, the court may impose the sanction under (c) [dismissal of appeal] without further notice.

Nevertheless, we believe that a final notice of 15-day grace period should be provided if the request for extension is accompanied by a legitimate motion for augmentation of record.

An examination of past California Supreme Court cases would suggest that the Petitioner was deprived of his Fifth and Fourteenth Amendment rights to due process. In *Byron Peebler et al. v. B. C. Olds et al.*, 26 Cal. 2d 656, 160 P.2d 545, the California Supreme Court wrote in its opinion:

> The character of the record would make a material difference in the substance of their brief. While correct practice should have suggested that they seek additional time for filing the brief, particularly when the clerk's transcript was on file and unchallenged, nevertheless, under all the circumstances, the default occurring while the appellants were availing themselves of their right to present their appeal upon a full and proper record should be relieved.

In our case, the Petitioner filed a motion for augmentation of the record accompanied with a timely request for extension of time. In fact, the augmentation motion was granted in a "final notice" that provided only 5 days to submit the brief, instead of the expected 15 days. However, the California Supreme Court's provision of relief to the appellant in *Peebler v. Olds*, ~~establishes~~ a precedent for completing the record on appeal then providing a standard final notice for appellant brief submission.

The Petitioner was also denied his Fourteenth Amendment right to equal protection of the laws in the failure of the California Supreme Court to grant the Petitioner additional time to file an opening brief as it had provided the appellants in *Peebler v. Olds*. An oft-cited principle in the California Supreme Court (for instance *In re Earl Floyd*

Parker on Habeas Corpus, 68 Cal. 2d 756, 441 P.2d 905 is that

> "The policy of the appellate courts [should be] 'to hear appeals upon the merits and to avoid, if possible, all forfeiture of substantial rights upon technical grounds.' (People v. Megugorac (1938) 12 Cal.2d 208 [82 P.2d 1108].)" (In re Martin, supra, 58 Cal.2d 133, 139.)

CONCLUSION

This case presents a significant question — whether an appellant is entitled to additional time to file the opening brief pending the outcome of the appellant's motion to augment the record. If the opinion below is allowed to stand, the Petitioner would have been denied due process as well as equal protection of the laws, and will suffer grave consequences as a result of the failure to obtain 15-day final notice to submit an opening brief consistent with the final form of the record on appeal. By granting this petition for a writ certiorari, this Court can correct the California Supreme Court's decision.

Accordingly, the Petitioner respectfully requests that the petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SIXTH APPELLATE DISTRICT DATED AND FILED FEBRUARY 25, 2004

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA,
SIXTH APPELLATE DISTRICT

COUNTY OF SANTA CLARA,

Plaintiff and Respondent,

v.

ANIEFIOK E. AKAN-ETUK,

Defendant and Appellant.

H025347
Santa Clara County No. DA081973

BY THE COURT:

The appellant having failed to file a brief after notice given under rule 17(a), California Rules of Court, the appeal is dismissed.

Date: FEB 25 2004 s/ Rushing, P.J.

APPENDIX B — OPINION OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SIXTH APPELLATE DISTRICT DATED AND FILED MARCH 25, 2004

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA,
SIXTH APPELLATE DISTRICT

COUNTY OF SANTA CLARA,

Plaintiff and Respondent,

v.

ANIEFIOK E. AKAN-ETUK,

Defendant and Appellant.

H025347
Santa Clara County No. DA081973

BY THE COURT:

Appellant's motion to set aside the order of dismissal dated February 25, 2004, is denied.

Date: MAR 25 2004 s/ Rushing, P.J.

APPENDIX C — OPINION OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SIXTH APPELLATE DISTRICT DATED AND FILED FEBRUARY 18, 2004

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA,
SIXTH APPELLATE DISTRICT

COUNTY OF SANTA CLARA,

Plaintiff and Respondent,

v.

ANIEFIOK E. AKAN-ETUK,

Defendant and Appellant.

H025347
Santa Clara County No. DA081973

BY THE COURT:

Appellant's motion to augment the record on appeal is granted. The record is deemed augmented to include the document designated as Exhibit 1 in appellant's motion, attached hereto and incorporated herein by reference.

Appellant's request for an extension of time to file his opening brief is denied and the brief is due within 5 days from the date of this order. No further extensions of time for filing of the opening brief shall be granted by the court in this case.

Date: FEB 18 2004 s/ Premo, J. Acting P.J.

APPENDIX D — ORDER OF THE SUPREME COURT OF CALIFORNIA DENYING PETITION FOR REVIEW FILED MAY 12, 2004

Court of Appeal, Sixth Appellate District - No. H025347
S123804

IN THE SUPREME COURT OF CALIFORNIA

En Banc

COUNTY OF SANTA CLARA,

Plaintiff and Respondent,

v.

ANIEFIOKE AKAN-ETUK,

Defendant and Appellant.

Petition for review DENIED.

s/ George
Chief Justice